Nos. 12535-12536

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

AND

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

WAREHAM C. SEAMAN

Attorney for Petitioner.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

PAGE

CASES

Nos. 12535-12536

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LOUIS RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

AND

CATHERINE RUBINO,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR REHEARING.

To the United States Court of Appeals for the Ninth Circuit and the Chief Judge and Associate Judges Thereof:

The appellants respectfully petition for a rehearing after the decision by this Court on January 2, 1951, affirming the judgment of The Tax Court of the United States and respectfully present:

INTRODUCTORY STATEMENT.

The decisions of this Court and The Tax Court have raised an important question of statutory construction of the Internal Revenue Code, and it is respectfully

submitted that the decisions have failed to rule on this question of law and that this failure creates a void in a very important section of the Internal Revenue Code extremely vital in the proper determination of tax liability. The absence of this judicial guidance will make for uncertainty in the application of this particular section and will result in the ultimate determination of tax liability solely upon the caprice of the agents of the Respondent except by resort to litigation. That this uncertainty should be resolved is demonstrated by the intervening decision of *Clement W. Delsing and wife, Mildred Delsing*, Appellants vs. *United States of America*, Appellee, in the United States Court of Appeals for the Fifth Circuit decided on January 5, 1951, which case can not be distinguished from that of appellants' in the facts involved. The citation is not available, but the decision is set out in full in the Appendix.

GROUNDS FOR REHEARING.

I.

This Court erred in failing to hold as a matter of law that for Federal Income Tax purposes appellants were entitled to report the gain from the sale of rental property subject to depreciation under Sec. 23(l), Internal Revenue Code, at the time of sale and held for longer than six months as Capital Gain under Sec. 117(j), Internal Revenue Code.

Appellants in their briefs and particularly in their oral argument set forth their strong reliance upon the statutory construction of Sec. 117(j), Internal Revenue Code, to the effect that the relief provisions of that section were intended by Congress to apply to the gain from the sale of any assets held for more than six months which were subject to depreciation under the provisions of Sec. 23(l), Internal Revenue Code. The failure of this Court to distinguish between the application of this section and that of Sec. 117(a), Internal Revenue Code, under the 1938 Revenue Act, which defines Capital Assets, and its departure from all other interpretations of the section except those of the past six months in the Tax Court will have the effect of making almost unavailable the relief intended by Congress in the enactment of Sec. 117(j), Internal Revenue Code.

Furthermore, the hesitancy of this Court to make a finding of law in the construction of Sec. 117(j)(l) will invite extensive litigation because it can reasonably be expected that in the absence of a judicial guidepost the Commissioner will increasingly ignore Sec. 117(j) in the determination of tax liability with the inevitable increasing resort to litigation.

II.

This Court erred in affirming the finding of The Tax Court of the United States that on the facts, appellants held rental property primarily for sale to customers in the ordinary course of their trade or business.

Attention of this court is respectfully drawn to the case of *Clement W. Delsing and wife, Mildred Delsing*, Appellants, vs. *United States of America*, Appellee in the United States Court of Appeals for the Fifth Circuit, supra.

Here the facts were surprisingly similar to those of this case and the Court said that the sole question was whether the finding was supported by the evidence or whether it should be set aside as clearly erroneous. In that case, in order to secure priorities, it was necessary to agree to construct the houses for rent. After completion the houses were rented on a month to month basis and the bulk of the homes were sold in one year rather than over a period of years. There was accounting segregation of houses for sale and for rent. The government relied principally upon two facts:

(1) A statement that "these houses are to be built for sale or rent. The houses will be offered for sale assuming permission for this can be obtained from the OPM on the basis", etc.

The Court felt that this statement had been overemphasized in view of the restriction in the formal application securing priorities.

(2) The taxpayers' income from sales greatly exceeded their income from sales and from rentals.

The court said that "the disparity between in-

come from sales and from rentals is not controlling." Moreover, in this case, it was indicated that the taxpayer was very active in building houses for sale which were admittedly taxable as ordinary gain.

Your petitioners respectfully cite this case not as indicative of the error of this court in its previous decision but for the purpose of clearly demonstrating the need for judicial direction on this section of the Code.

A taxpayer, as contrasted with the respondent, is at a disadvantage in his selection of forum. Conversely, the advantage in such selection by the respondent can make for unequal application of the tax laws.

CONCLUSION

It is respectfully submitted that this Court should resolve the issue of law by a statutory construction of Sec. 117(j), Internal Revenue Code, in the interest of justice to your petitioners and to set a judicial standard by which tax liability under this section can be determined without the necessity of needless and excessive litigation.

Respectfully submitted,

WAREHAM C. SEAMAN,
Attorney for Petitioner.

I hereby certify that in my judgment the Petition for Rehearing is well founded, and that it is not interposed for delay.

WAREHAM C. SEAMAN,
Attorney for Petitioner.

Appendix

APPENDIX.

In the United States Court of Appeals
for the Fifth Circuit

No. 13,243. January 5, 1951

CLEMENT W. DELSING AND WIFE, MILDRED DELSING,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of Texas.

Reversing and remanding the decision of the United States District Court.

Before HUTCHESON, Chief Judge, and

HOLMES and RUSSELL, Circuit Judges.

RUSSELL, Circuit Judge: In this suit to enforce refund of income taxes, in the District Court the parties by stipulation submitted as the sole issue, whether the profit from the sale of Twelve and one-half duplex dwelling units should be treated as capital gain under the provisions of Section 117(j) (1) (B) of the Internal Revenue Code, or ordinary income, with determination of this in turn restricted to whether such property was

or was not held "primarily for sale to customers in the ordinary course" of the plaintiff taxpayers' "trade or business." Upon evidence presented by stipulation, and by the oral testimony of the taxpayer, the trial Court found "the facts to be as stipulated by the parties plus the fact that these properties were orginally constructed for sale, or, rental, and, that that course of sale was in the regular course of business when they were sold," and entered judgment for the government. Thus the sole question here presented is whether the finding is supported by the evidence, or whether it should be set aside as clearly erroneous.

We have concluded that the finding of the Court has no sufficient support in the evidence, is therefore clearly erroneous, and must be set aside.

Without attempting to fully detail the facts, it is sufficient to say that the general factual situation relied upon by the taxpayer is that though he, in partnership with another, had for several years prior to World War II been engaged in a substantial business of construction of homes for sale,—which sales were always consummated prior to or upon completion of the houses,—as the result of solicitation of officials of the Federal Housing Administration in their effort to provide defense rental housing units for war workers in the North Texas area, constructed forty-five defense rental units. In order to construct the housing units it was necessary to secure priorities, and as a result of application for preference ratings, made in March, 1942, the taxpayer and the partnership were required to and did agree to construct the houses for rent at fixed monthly

rental to persons engaged in war activities, and further agreed not to dispose, or contract for disposal, except in accordance with defined regulations which, as amended, required taxpayer to hold the duplex houses here involved for rent at rentals authorized, and further to rent only to eligible war workers. This order provided that the war worker tenant could purchase the duplex after a minimum period of four months, later reduced to two months, on specified terms. After completion the housing units were rented to war workers on a month to month basis, and continued to be rented until August of 1945 when occurred the first of the sales now involved, and the remainder of which were consummated in October and December of 1945.[1] By agency regulation, on and after August, 1943, taxpayer could have sold one-third of the entire defense rental project, but he at no time made any effort to secure approval or to sell any of the units until solicited by returning service men in 1945 to whom he made the sales referred to. To service the rental units the taxpayer maintained a rental office and also devoted a major portion of his time to the operation and management of the properties in performing the activities customary in connection with rental properties. There was a complete segregation of bookkeeping entries and accounting between the income from rental property and the house construction and sales activities of taxpayer. From 1942 to 1945, these latter related only to some 273 defense housing units constructed for sale in 1944 by a different part-

[1] The partnership was dissolved in May, 1944, at which time taxpayer received title to twenty-two and one-half of the duplexes and continued after 1945 to rent the remaining ten.

nership of which taxpayer was a member. After 1945 the construction exclusively for sale business of taxpayer was likewise segregated. Profit from these sales was reported as ordinary income. No "for sale" or advertisements were placed as to any of the claimed rental property. This was in direct contrast with the sale procedure employed in procuring sales of other property constructed for sale in the period 1945 to 1948. In the latter instance, as was generally true in disposing of houses constructed for sale, the sales were effectuated by a real estate agent. Taxpayer was not a licensed real estate agent.

The only facts relied upon by the government, which could be considered at all material, to controvert and overthrow the taxpayer's position as above summarized, are the statements in a letter written by the taxpayer in January of 1942 to the Federal Housing Administration, apparently as a part of an application for insured loans that "these houses are to be built for sale or rent. The houses will be offered for sale, assuming permission for this can be obtained from the O. P. M., on the basis," etc., together with the fact that during the years in question the taxpayer's income from sales, his usual business, greatly exceeded his income from rentals.

It is apparent from the finding of the trial Court that much weight was given to the statement of intention contained in the letter referred to, and also to the admitted fact that the taxpayer's sales activities constituted his major activity, and from this the Court found that any sale of real estate by him

was in the ordinary course of his business. We think the weight to be given to the statement in the letter has been overemphasized in view of the subsequent restriction embodied in the formal application and agreement under which the houses were actually built, held, and operated by the taxpayer during the period of approximately three years. The disparity between income from sales and from rentals is not controlling. Under the facts and circumstances of this case, we find no permissible basis for a determination that the sales of the originally constructed defense rental housing units constituted a disposition of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business," so as to render the profit taxable as ordinary income[2].

We think the transactions evidenced the sale of capital assets and that accordingly the judgment must be, and is reversed and the cause remanded with direction to enter judgment in favor of the taxpayer for the amount of the refund claimed.

Reversed.

---

[2] Compare Dunlap v. Oldham Lumber Company, 178 Fed. (2d) 781 [50-1 USTC ¶ 9134].